

INTERNAL REVENUE SERVICE

July 24, 2002

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CONEX 132996-02
CC:TEGE



Dear [REDACTED]:

This letter is in response to your inquiry (copy enclosed) dated June 12, 2002. You asked for clarification of the IRS position concerning the taxation of retirement incentives following the ruling of the United States Court of Appeals for the Eighth Circuit in the *North Dakota State University* case. You also want to know if we are consistently applying the federal tax law on this issue.

The Eighth Circuit is the first circuit court to address the issue of whether amounts paid by a taxpayer to tenured university professors under its early retirement program should be considered wages for the purposes of Federal Insurance contributions Act (FICA) taxes. The court held that payments made to tenured faculty under North Dakota State University's early retirement program were made in exchange for relinquishing the tenured faculty members' contractual and constitutionally-protected tenure rights rather than as remuneration for services. The court held that these payments are not wages subject to FICA taxation.

The IRS argued, in part, that the determination of whether early retirement payments made to tenured faculty members are wages subject to FICA taxes depends on whether such payments arise out of the employer-employee relationship and not on whether the payments are made to employees to relinquish a contractual and constitutionally-protected right. The IRS believes its position is correct relying, in part, on *Social Security Board v. Nierotko*, 327 U.S. 358 (1946), in which the Supreme Court stated that the term "wages" is to be broadly interpreted "to import the breadth of coverage" consistent with the purposes of the Social Security Act.

When a circuit court issues an opinion adverse to the IRS, we will apply many factors to determine whether the opinion is significantly adverse that we should not follow it. If we believe we should not follow the opinion, we will issue a document called an Action on Decision to announce that fact. Actions on Decision are issued to enhance the IRS'

consistency to future litigation or dispute resolution.

We issued an Action on Decision (copy enclosed) CC-2001-08 in 2001-53 I.R.B. (December 31, 2001), nonacquiescing in the *North Dakota State University* decision. The IRS disagrees with the holding of the Eighth Circuit and will not follow the holding outside the Eighth Circuit. However, we recognize the precedential impact of the opinion on cases arising within the jurisdiction of the deciding circuit. Thus, the IRS will issue refunds of FICA taxes to taxpayers under the jurisdiction of the Eighth Circuit in cases that have the exact facts as in *North Dakota State University* case, involving payments to college or university professors made in exchange for the relinquishment of their tenure rights.

I hope this information is helpful. Please call attorney, Elliot M. Rogers, IRS ID #50-11827, or Senior Technician Reviewer, Michael Swim, IRS ID #50-07123 at (202) 622-6040, if you have any questions.

Sincerely,

Michael A. Swim
Acting Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)
Office of the Division Counsel/
Associate Chief Counsel
(Tax Exempt and Government Entities)

Enclosures (2)